IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-832

THE HEARST CORPORATION and its Division, LOS ANGELES HERALD-EXAMINER and HILLBRO NEWSPAPER PRINTING COMPANY,

Petitioners,

vs.

LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

DANIEL FOGEL,
5900 Wilshire Boulevard,
Suite 2600,
Los Angeles, Calif. 90036,
Attorney for Respondent.

Of Counsel:
BODLE, FOGEL, JULBER, REINHARDT,
and ROTHSCHILD,
STEPHEN REINHARDT,
LESTER G. OSTROV.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Opinions Below 1

Counterstatement of the Case 2

Reasons for Denying the Writ 10

1. The Decision of the Court of Appeals Is Based Upon the Complex, Unusual and Unique Facts of the Instant Case and Raises No Substantial Issue of Federal Labor Law 10

2. The Decision of the Court of Appeals Was Based Upon a Number of Independent Grounds, Each of Which Justified the Decision Reached, and None of Which Raises an Issue Warranting Review by This Court 12

   A. The Conclusion of the Court of Appeals That the AAA Failed to Comply With Its Rules in the Purported Appointment of the Arbitrator Was Correct and Raises No Substantial Issue Warranting Review by This Court 13

   B. The Conclusion of the Court of Appeals That "The Arbitrator so Circumscribed His Role as to Make the Proceedings Before Him a Legal Nullity" Was Correct and Raises No Substantial Issue Warranting Review by This Court 16

   C. The Court of Appeals' Conclusion That the Record Contains No Facts Upon Which a Claim of Lack of Timeliness Can Be Sustained Was Correct, Justified Vacating the Award on the

Page

Ground That It Was Not Based on the Essence of the Agreement and Raises No Substantial Issue Warranting Review by This Court 18

3. The Decision Below Does Not Conflict With John Wiley & Sons v. Livingston, 376 U.S. 543 23

4. The Decision Below Does Not Conflict With United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, or With the Decisions of Other Circuits Holding That an Arbitration Award Is to Be Vacated When It Fails to Draw Its Essence From the Agreement and Does Not Raise Any Substantial Issue Warranting Review by This Court 26

5. The Decision Below Does Not Nullify Ex Parte Arbitration and Does Not Frustrate the National Labor Policy of Favoring Arbitration as the Method for Settling Disputes 29

Conclusion 31

TABLE OF AUTHORITIES CITED

Cases	Page
Anaconda Co. v. Smeltermen's Union No. 16, 402 F.2d 749 (9th Cir., 1968)	28
Bertero v. Superior Court, 216 Cal.App.2d 213 (2d Dist., 1963)	22
Bethlehem Mines Corp. v. United Mine Workers, 344 F.Supp. 1161 (W.D. Penn., 1972)	15
Boston Mutual Life Ins. Co. v. Insurance Agents' Int'l Union, 171 F.Supp. 125 (D. Mass., 1959), aff'd 268 F.2d 556 (1st Cir., 1959)	21
Bhd. of Railway Trainmen v. Central of Ga. Ry. Co., 415 F.2d 403 (5th Cir., 1969)	20
General Drivers, Local 89 v. Riss & Co., 372 U.S. 517 (1963)	14
Glass Bottle Blowers Assn. v. Arkansas Glass Container Corp., 183 F.Supp. 829 (E.D. Ark., 1960)	22
H.K. Porter Co. v. United Saw, File & Steel Products Workers, 333 F.2d 596 (3d Cir., 1964)	20
Holly Sugar Corp. v. Distillery Rectifying Union, 412 F.2d 899 (9th Cir., 1969)	28
Hydraulic Press Mfg. Co., 39 LA 1135 (Arb. Dworkin, 1962)	21
Intl. Assn. of Machinists v. Hayes Corp., 296 F.2d 238 (5th Cir., 1961)	20, 21, 22
IUOE Local 150 v. Flair Builders, Inc., 406 U.S. 487 (1972)	23, 24, 25, 26
John Wiley & Sons v. Livingston, 376 U.S. 543 (1964)	23, 24, 26
Labor Standards Assn., 48 LA 425 (Arb. Joseph, 1967)	21

Page

Lane, Ltd. v. Larus & Bros. Co., 243 F.2d 364 (2d Cir., 1957) 22

Local 227, International Hod Carriers, etc. v. Sullivan, 221 F.Supp. 696 (E.D. Ill., 1963) 15

Local 342, UAW v. T.R.W., Inc., 402 F.2d 727 (6th Cir., 1968) 19, 20

Magma Copper Co., 40 LA 45 (Arb. Gorsuch, 1962) 21

Riess v. Murchison, 384 F.2d 727 (9th Cir., 1967) 22

San Francisco-Oakland Newspaper Guild v. Tribune Publishing Co., 407 F.2d 1327 (9th Cir., 1969) 28

Smith v. Union Carbide Corp., 350 F.2d 258 (6th Cir., 1965) 15

Southwestern Electric Power Co. v. Local Union 738, IBEW, 293 F.2d 929 (5th Cir., 1961) 22

Textile Workers v. American Thread Co., 291 F. 2d 894 (4th Cir., 1961) 20

Torrington Co. v. Metal Products Workers Local 1645, 362 F.2d 677 (2nd Cir., 1966) 28

Truck Drivers & Helpers Union Local 784 v. Ulry-Talbert Co., 330 F.2d 562 (8th Cir., 1964) 19

United Steelworkers of America v. Amax Aluminum Mill Products, Inc., 451 F.2d 740 (9th Cir., 1971) 28

United Steelworkers of America v. American Intl. Aluminium Corp., 334 F.2d 147 (5th Cir., 1964) 22

United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960) ..19, 26, 27

Rules — Page

Voluntary Labor Arbitration Rule 8 13

Voluntary Labor Arbitration Rule 12 13

Statutes

Labor Management Relations Act of 1947, Sec. 301(a) 3

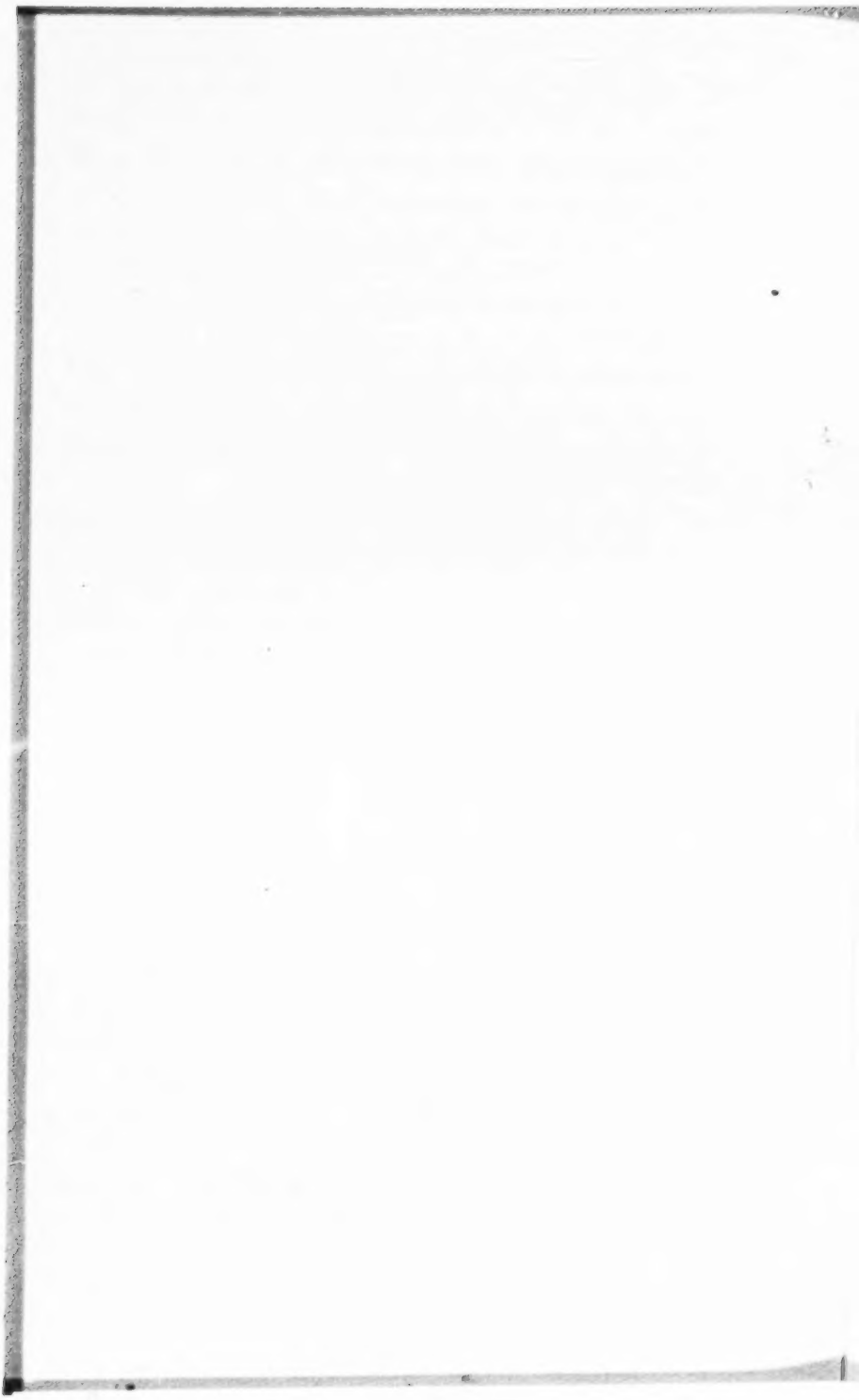
United States Arbitration Act, Sec. 10(d) 14

United States Code, Title 9, Sec. 10(d) 14

United States Code, Title 29, Sec. 185(a) 3

Textbook

5 American Jurisprudence 2d, Sec. 150, p. 631 14



IN THE

Supreme Court of the United States

October Term, 1974
No. 74-982

THE HEARST CORPORATION and its Divisions, LOS ANGELES HERALD-EXAMINER and HILLBRO NEWSPAPER PRINTING COMPANY,

Petitioners,

vs.

LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Respondent Los Angeles Newspaper Guild (hereinafter referred to as "the Guild"), hereby opposes the Petition for a Writ of Certiorari filed by Petitioners The Hearst Corporation, etc. (hereinafter referred to as "Hearst"), and respectfully urges that it be denied.

OPINIONS BELOW.

The opinion of the court of appeals, reported at 504 F.2d 636, is set forth in Appendix A to the Petition; the opinion and order of the district court, reported at 352 F.Supp. 1383, is set forth in Appendix B to the Petition.

The opinion of the court of appeals was issued with respect to two companion appeals, No. 73-1742 and No. 73-1838. The two appeals involved the same parties, arose out of the same events, and were argued and considered together. In No. 73-1742, the court ordered the parties to arbitrate the merits of the disputes. The court, in view of its decision in No. 73-1742 holding that the merits of the disputes between the parties should be submitted to arbitration, affirmed the dismissal of the complaint of the Guild and certain members of the Guild (employees of Hearst) for damages and other judicial relief in No. 73-1838.*

Hearst's instant petition seeks a review of the court's decision with respect to No. 73-1742 ordering arbitration of the disputes. Respondent respectfully submits that the petition herein raises no issue warranting review and should be denied.

COUNTERSTATEMENT OF THE CASE.

The decision of the court of appeals in No. 73-1742 arises out of a Petition to Vacate an Arbitration Award which held certain grievances not arbitrable. The underlying dispute, which also forms the basis for the civil complaint in No. 73-1838 for breach of contract, recovery of unpaid wages and certain declara-

---

*The Guild and the other plaintiff-appellants in No. 73-1838 have filed a Petition for Writ of Certiorari with respect to the decision of the court in No. 73-1838 affirming the dismissal of plaintiffs' action for judicial relief (Sup.Ct. No. 74-1086). In the petition filed in No. 74-1086, the Guild and its members advised this Court that they sought a writ of certiorari with respect to the court of appeals' decision in No. 73-1838 only if Hearst's instant petition with respect to the court of appeals' decision in No. 73-1742 were to be granted, and that if Hearst's instant petition for writ of certiorari were denied, the Guild and its members would no longer urge the granting of certiorari in No. 74-1086.

tory relief, involves the refusal of Hearst to pay certain vested and earned retirement and severance pay benefits (denominated "alternate benefits" and "dismissal pay") provided for in a series of collective bargaining agreements between the Guild and Hearst. Federal jurisdiction was based on Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a).

There is no substantial dispute as to the material facts, most of which were stipulated by the parties and are set forth in the opinion of the court of appeals.

Under the provisions of a series of collective bargaining agreements between the Guild and Hearst, the first of which was entered into in 1939 and the most recent of which was entered into on January 28, 1966, employees who reached the age of 65 or who completed 25 years of service or who became permanently incapacitated were entitled to receive, upon their resignation, a cash lump sum payment based upon their years of service. Similarly, employees who had completed six months of service were to receive, in the event of dismissal, a cash lump sum payment based upon years of service, and the beneficiaries of deceased employees with six months or more of service were also to receive such a payment upon the death of said employees. The collective bargaining agreements also contained a provision for arbitration of grievances.

In October, 1967 Hearst and the Guild began negotiations for new agreements. These negotiations have continued to date without success. On December 15, 1967, because of the inability of the parties to reach agreement on a new contract, the Guild called a strike against Hearst, which has also continued to date.

After December 15, 1967, Hearst consistently refused to pay all claims for alternate benefits and dismissal pay, consistently denied that the agreements were applicable or of any force or effect or that it had any duties or obligations under the agreements or any duties or obligations to pay any alternate benefits or dismissal pay benefits, consistently maintained that the arbitration provisions of the agreements were not applicable or in effect, and consistently refused to arbitrate the disputes or proceed to the selection of an arbitrator.

From March, 1968 through August, 1968, during meetings between the parties and in frequent correspondence between the parties, the Guild attempted to convince Hearst to pay the claims, filed grievances over Hearst's refusal to do so and, on several occasions, requested arbitration of the disputes and asked Hearst to participate in the selection of an arbitrator. Hearst consistently rejected the claims, maintained that the agreements, and the alternate benefits, dismissal pay and arbitration provisions thereof were no longer applicable or in effect, contended that it had no obligations under the agreements, refused to arbitrate the dispute and refused to participate in the selection of an arbitrator.

In late 1968, a number of members of the Guild attempted to enforce their claims through the office of the Labor Commissioner of the State of California under the provisions of the Labor Code of the State of California. The Labor Commissioner held in favor of the claimants and demanded payment from Hearst, but Hearst failed to comply with the demand. Thereafter, the Labor Commissioner advised the Guild, first, that he would attempt to have a criminal complaint is-

sued against Hearst, and later, that he would attempt to pursue a civil action against Hearst. Finally, the Labor Commissioner declined to take any action against Hearst on the ground that the claimants had an available remedy through arbitration and, on May 12, 1969, reassigned the claims to the claimants.

Thereafter, the Guild wrote to Hearst in another effort to obtain Hearst's agreement either to pay the benefits or proceed to arbitration. Hearst responded by reiterating its position that neither the agreements nor the alternate benefits, dismissal pay or grievance-arbitration provisions thereof were applicable or in effect. Hearst offered to meet concerning the subject matter of the claims, but advised the Guild "we will not meet with you for the purpose of selecting an impartial arbitrator or otherwise proceeding to arbitration." A meeting was held on August 27, 1969, at which time Hearst again repudiated the agreements and the alternate benefits, dismissal pay and arbitration provisions thereof, refused to pay the claims, and refused to select an arbitrator or otherwise proceed to arbitration.

On October 3, 1969, the Guild wrote to the American Arbitration Association ("AAA") and asked it to appoint an arbitrator pursuant to its rules. On October 8, 1969, in disregard of and non-compliance with its own rules, the AAA purported to appoint Thomas T. Roberts to hear the dispute. In purporting to appoint Roberts, the AAA gave no prior notification to the parties, failed to first submit a list of possible arbitrators to either party for selection or rejection of particular arbitrators, and failed to permit Hearst an opportunity to file an answering statement to the Guild

request prior to the appointment of an arbitrator, all as required by the AAA rules.

On November 11, 1969, Roberts wrote each party advising that he had calendared a threshold proceeding for February 3, 1970, to discuss issues relating to the viability of the grievance, the propriety of arbitration, the procedure to be followed and his jurisdiction. Roberts stated further, however, that "any appearance on that date will not constitute a recognition of my jurisdiction nor will it be deemed a waiver of available defenses relating to a lack of arbitrability."

On January 12, 1970, Hearst responded, advising Roberts of its position that the matter was not arbitrable because the collective bargaining agreements had expired prior to accrual of the claims and prior to any demand for payment or arbitration, and because the AAA's rules "are inapposite, and in any event have not been complied with". The letter continued:

> "Since we have been invited, we anticipate being present at the hearings; however, our presence is not a recognition of your jurisdiction nor a general or special appearance. Any participation on our part at those hearings should not be considered as a general appearance, special appearance, nor recognition of your jurisdiction; or is it in any way whatsoever a waiver of our stated position that this matter is not arbitrable. The Herald-Examiner's involvement in this arbitration should not be construed as a relinquishment of its right and intention to proceed before any appropriate tribunal to vindicate its position that this matter is not arbitrable."

At the outset of the meeting on February 3, 1970, Hearst reiterated its position as set forth in its January 12, 1970 letter, again stating that its participation was neither a general nor a special appearance and should not be construed in any way as a waiver of its position that the matter was not arbitrable. Then, for the first time, Hearst contended that the matter was not arbitrable because the Guild allegedly had not made a timely request to the AAA for appointment of an arbitrator. After a short discussion of the proposed agenda for the meeting, the arbitrator interrupted to make clear the basis upon which the proceeding was being conducted:

> "Let's consider another problem now before we go any deeper into this question. It should be clearly stated on the record that the Guild understands that if we go forward this morning regarding anything that the company is not making a special appearance, a general appearance or a half-way between appearance."

When the proceeding continued, the sole matter on which testimony and argument was received was the alleged failure of the Guild timely to request the AAA to appoint an arbitrator under Article VII of the agreements, which provided that if an arbitrator was not selected by mutual agreement of the parties "the complaining party has the right to request the American Arbitration Association to proceed to the appointment of an arbitrator pursuant to the present rules" of the AAA. Article VII contained specific time limits for each step of the grievance procedure except this final step providing for a unilateral request to the AAA. As to this step, the agreement set forth no time limit.

On August 12, 1970, Arbitrator Roberts rendered his purported Findings and Award. Therein, he specifically limited his inquiry to "the narrow issue of whether or not the Guild sought the appointment of an arbitrator in a timely manner." Rejecting the concept of laches, and instead purporting to insert into the agreement a "statute of limitations", the arbitrator concluded that the Guild had not applied to the AAA for appointment of an arbitrator in a timely manner.

On September 3, 1970, the Guild wrote to Hearst and advised it that the Guild rejected Roberts' purported "Findings and Award" and considered them null and void and not binding on the Guild. The Guild renewed its demand for payment of alternate benefits and dismissal pay.

On September 9, 1970, Hearst replied to the Guild letter of September 3, 1970, and rejected the Guild's demand for payment of alternate benefits and dismissal pay. Hearst further stated that it was its position that Roberts' purported award had settled Hearst's liability.

The Guild thereafter filed a petition to vacate the purported award and a complaint for damages, recovery of unpaid wages, declaratory and other judicial relief.

The district court vacated the purported arbitration award and ordered the parties to submit the dispute to the grievance procedure and, if necessary, to arbitration. The district court also dismissed plaintiffs' com-

plaint on the ground that arbitration was the exclusive remedy.

The court of appeals affirmed the district court's decision, vacating the award on a number of grounds including, *inter alia*, the failure of the AAA to comply with its rules in the purported appointment of the arbitrator (Appendix "A" to Petition, pp. A-7 and A-12), the arbitrator's circumscribing of his role so as to make the hearing a legal nullity by failing to assert jurisdiction over the subject matter of the dispute and by acknowledging that Hearst was making no appearance, either general or special (Appendix "A" to Petition, pp. A-7 and A-8), the arbitrator's insertion of a *quasi* statute of limitations into the agreement, and the absence of any facts in the record upon which the claim of lack of timeliness could be sustained (Appendix "A" to Petition, pp. A-9, A-12, A-14). The court of appeals modified the district court judgment by ordering the parties to proceed directly to arbitration. The court of appeals, in view of its decision ordering arbitration, affirmed the dismissal of the complaint in No. 73-1838.

REASONS FOR DENYING THE WRIT.

1. The Decision of the Court of Appeals Is Based Upon the Complex, Unusual and Unique Facts of the Instant Case and Raises No Substantial Issue of Federal Labor Law.

In its petition for writ of certiorari, Hearst has attempted to read into the decision of the court of appeals broad holdings and far-reaching new principles of law with respect to the scope of review of arbitrator's awards, jurisdiction to decide procedural affirmative defenses, and the necessity of a prior determination of substantive arbitrability. In its attempt to persuade this Court that there are issues warranting its consideration, Hearst has theorized, interpreted, and added conclusions to the decision below which were neither expressed nor intended by the court. As we shall discuss *infra,* the court of appeals made no such broad holdings and established no such far-reaching new principles of law.

On the contrary, as is evident from the decision of the court of appeals, the instant case was decided on the basis of a complex, unusual and unique set of circumstances which is unlikely to reoccur. The court merely held that under the peculiar circumstances of this case, arbitration was the appropriate remedy.

The collective bargaining agreement contained a provision for the appointment of an arbitrator by the AAA upon the unilateral request of the complaining party, such an appointment was made by the AAA, but in disregard of and non-compliance with its rules, and the arbitrator so appointed failed to assert jurisdiction over the subject matter of the dispute and held a so-called hearing at which Hearst was present, but de-

nied that the arbitrator had jurisdiction and objected to the AAA's failure to comply with its rules in the appointment of the arbitrator, and, with the arbitrator's agreement, made no legal appearance—a hearing at which all issues as to arbitrability and as to his jurisdiction were reserved and never decided by the arbitrator.

Moreover, the entire dispute and all proceedings and discussions which occurred were in the context of an ongoing strike and in the face of Hearst's continuing position that the agreements had expired and were of no force or effect, that the matter was not arbitrable and that Hearst was entitled to a judicial determination as to arbitrability, and in the face of Hearst's continuing refusal to arbitrate the dispute, proceed to the selection of an arbitrator or recognize the jurisdiction of an arbitrator.

The court of appeals, recognizing the unique facts herein, stated in its opinion:

> "Both parties have cited hosts of cases dealing with the labor problems of other companies under other circumstances. Most of them stand for the proposition that arbitration is to be favored for a solution of labor disputes as indeed it should be if the subject matter of the disputes is put fairly before the arbitrator.
>
> "However, this court is not called upon to debate the wisdom of other decisions upon other facts. Our task is to decide the relief which should be granted upon the specific facts before us." (Appendix "A" to Petition, p. A-14.)

Clearly, the instant case arises out of a unique set of circumstances. Weighing all of the unusual facts of the

case, the court of appeals concluded that arbitration was the proper forum for resolution of plaintiffs' claims for vested retirement and dismissal benefits and that after seven years of "legal skirmishes" which had failed to reach the merits, it was "time to get on with it". In reaching these conclusions, the court set down no new principles of law, but rather, decided a unique case upon the particular facts before it. Under these circumstances, we respectfully submit that the decision of the court of appeals ordering arbitration raises no substantial issue of federal labor law and does not warrant review by this Court.

2. The Decision of the Court of Appeals Was Based Upon a Number of Independent Grounds, Each of Which Justified the Decision Reached, and None of Which Raises an Issue Warranting Review by This Court.

As will be discussed more fully *infra*, the issues which Hearst attempts to have this Court review are neither raised by nor ruled upon in the decision of the court of appeals herein. Moreover, even if any of such issues were considered by the court below, it is clear that the court made no holding with respect to such issues and, as will be discussed herein, that the decision was based upon a number of independent grounds, each of which justifies the decision reached and none of which warrants review. Under these circumstances, we respectfully submit that the petition for certiorari should be denied.

A. The Conclusion of the Court of Appeals That the AAA Failed to Comply With Its Rules in the Purported Appointment of the Arbitrator Was Correct and Raises No Substantial Issue Warranting Review by This Court.

One of the bases for the court of appeals' decision in the instant case was its conclusion that the AAA purported to appoint Roberts as arbitrator "[i]n disregard of, and in non-compliance with, its own rules."* (Appendix "A" to the Petition, pp. A-7 and A-12.)

As the court of appeals correctly concluded, the purported appointment of the arbitrator in non-compliance with the AAA rules rendered the proceedings and the award invalid.** Section 3B of Article VII of

---

*The AAA failed to give Hearst notice of the Guild request and failed to afford Hearst an opportunity to respond to the Guild request, as required by its rules (Voluntary Labor Arbitration Rule 8) and as specifically requested by Hearst in an earlier letter to the AAA. The AAA also failed to send a list of arbitrators to the parties as required by its rules (Voluntary Labor Arbitration Rule 12) prior to making a unilateral appointment, thus depriving at least the Guild (and Hearst if it had chosen to exercise the opportunity) of the right to strike unacceptable arbitrators and list its preference among those who were acceptable.

**Hearst argued below and in a footnote to its petition herein that any defect in the appointment was waived by the Guild when the Guild failed to object in writing to the appointment. This argument is clearly without merit. First, the arbitrator himself reserved to both parties all defenses or arguments as to his jurisdiction in his initial letter to the parties scheduling the preliminary hearing. Second, Hearst, recognizing the invalidity of the appointment, advised Roberts by letter dated January 12, 1970 of Hearst's position that the matter was not arbitrable and that Roberts lacked jurisdiction because *inter alia*, the AAA rules "are inapposite, and in any event have not been complied with". Thus, Hearst reserved its defense based upon the non-compliance with the AAA rules and no binding award could have been issued against Hearst. Accordingly, no *mutually* final and binding award could have been issued and therefore no binding award could have been issued against the Guild. It is, of course, hornbook law that arbitration proceeds as a matter

(This footnote is continued on next page)

the collective bargaining agreements, which gives the complaining party the right unilaterally to request an AAA appointment of an arbitrator provides:

> ". . . the complaining party has the right to request the American Arbitration Association to proceed to the appointment of an arbitrator *pursuant to the present rules of the voluntary labor arbitration tribunal of the American Arbitration Association,* and the grievance shall be submitted to such arbitrator for final decision." (Emphasis added.)

Thus, the parties agreed to be bound by the decision of an arbitrator only if he was selected pursuant to the rules of the voluntary labor arbitration tribunal. Since an arbitrator serves only by agreement of the parties, he must be selected or designated in accordance with the agreement of the parties. Here the parties had agreed that the AAA could appoint an arbitrator at the request of the complaining party if the parties were unable to agree or if one party refused to participate in the selection, but the AAA was required to make the appointment in accordance with its rules, and this it did not do. Thus, the arbitrator was not selected or designated in accordance with the agreement of the parties, as set forth in the collective bargaining agreement.

Although the issue raised by the selection or designation of an arbitrator in a manner which does not

---

of contract between the parties. As a contractual matter, an arbitration award must be final and binding as to both parties, or it cannot be enforced against either. Just as a contract lacking mutuality is invalid, so also is an arbitration award which lacks mutuality. (See 5 Am. Jur. 2d, Arbitration and Award, Section 150, p. 631; Section 10(d), United States Arbitration Act, 9 U.S.C. §10(d); *c.f. General Drivers, Local 89 v. Riss & Co.,* 372 U.S. 517, 520 (1963).)

comply with the agreement of the parties or by the holding of proceedings in a manner which does not comply with such agreement has arisen in the courts infrequently, the courts, when called upon to consider the issue, have concluded that the selection process and method of hearing agreed upon by the parties are integral parts of the agreement to arbitrate and that the contractually agreed upon method for appointment of an arbitrator and method of hearing must, at least in the absence of a waiver by the parties, be followed in order to have a valid appointment, hearing or award. *Smith v. Union Carbide Corp.*, 350 F.2d 258 (6th Cir., 1965); *Local 227, International Hod Carriers, etc. v. Sullivan*, 221 F.Supp. 696 (E.D. Ill., 1963); *c.f. Bethlehem Mines Corp. v. United Mine Workers*, 344 F.Supp. 1161, 1165 (W.D. Penn., 1972).

In the instant case, the court of appeals correctly concluded that the method of appointment of an arbitrator set forth in the collective bargaining agreements, *i.e.*, appointment by the AAA in accordance with its rules, was not followed. Accordingly, the arbitrator was not selected or appointed in accordance with the collective bargaining agreement, the parties did not waive the contractual provisions establishing the method of appointment, the purported appointment was a nullity, and the arbitrator at all times lacked jurisdiction to issue any award. The court of appeals therefore properly vacated the award the arbitrator purported to issue.

In vacating the award on this narrow ground, the court of appeals created no new law and decided no issue of any broad significance in the administration of federal labor laws.

B. The Conclusion of the Court of Appeals That "The Arbitrator so Circumscribed His Role as to Make the Proceedings Before Him a Legal Nullity" Was Correct and Raises No Substantial Issue Warranting Review by This Court.

The court of appeals, in its opinion, correctly concluded that the arbitrator accepted Hearst's refusal to recognize the agreement and to appear and "so circumscribed his role as to make the proceedings before him a legal nullity." (Appendix "A" to Petition, pp. A-7 to A-8 and A-13.) This conclusion is amply supported by the record and forms a separate and independent basis for vacating the award herein.

Having been notified previously that Hearst contended that he lacked jurisdiction of the subject matter, the arbitrator wrote to the parties on November 11, 1969, suggesting that the parties meet to discuss preliminary matters on February 3, 1970, but carefully specifying that any appearance before him on February 3, 1970 would be in the nature of a "special appearance", and would not constitute a recognition of his jurisdiction or a waiver of available defenses relating to a lack of arbitrability. Hearst replied to this letter on January 12, 1970, and, not content with a special appearance, stated:

> "[H]owever, our presence is not a recognition of your jurisdiction nor a general or *special* appearance. Any participation on our part at those hearings should not be considered as a general appearance, *special* appearance nor recognition of your jurisdiction; or is it in any way whatsoever a waiver of our stated position that this matter is not arbitrable." (Emphasis added.)

This insistence by Hearst that it was making no appearance—neither general nor special—by participating in the February 3, 1970 hearing was reiterated by its counsel at the very beginning of that hearing. Hearst clearly was attempting to gain all the benefits of participating in the hearing by way of presenting arguments and objections, while at the same time refusing to submit itself to the jurisdiction of the arbitrator on any issue. But instead of opposing this attempt to have the best of both worlds, the arbitrator specifically concurred in Hearst's efforts, acknowledging that Hearst was "not making a special appearance, a general appearance, or a half-way between appearance."

The arbitrator declined to assert jurisdiction over Hearst or even to attempt to do so; instead, he concurred in Hearst's position that despite its physical presence it was not appearing before the arbitrator and was not bound by anything that might come out of the hearing.

This unique arrangement differs substantially from an *ex parte* arbitration, for in the latter proceeding the party who is not physically present is considered, as a matter of law, to be appearing. The arbitrator, by agreeing that Hearst was not making a legal, as opposed to a physical, appearance, was agreeing that Hearst would not be bound by any decision he might render. As the court of appeals correctly concluded, the arbitrator "so circumscribed his role as to make the proceedings before him a legal nullity."

Under the peculiar procedure adopted by the arbitrator in this case, Hearst could not be bound by any award entered by the arbitrator. Under these circum-

stances, of course, the arbitrator also could not issue any award binding upon the Guild, since an award must be *mutually* final and binding in order to be valid or effective as to either party.*

As the court of appeals correctly concluded, the proceeding was a legal nullity. Under the unique circumstances herein, the purported award was properly vacated on this ground, as well as others. The court's decision vacating the award on this ground raises no issue warranting review by this Court.

C. The Court of Appeals' Conclusion That the Record Contains No Facts Upon Which a Claim of Lack of Timeliness Can Be Sustained Was Correct, Justified Vacating the Award on the Ground That It Was Not Based on the Essence of the Agreement and Raises No Substantial Issue Warranting Review by This Court.

The court of appeals, in its opinion, correctly concluded that the record herein contained no facts upon which a claim of lack of timeliness could be sustained. (Appendix "A" to Petition, pp. A-12 and A-14.) The court, recognizing its limited role in reviewing an arbitrator's award, set down no new broad standards for review. It merely held, in effect, that under the particular circumstances herein the award did not draw its essence from the agreement. Such a holding is consistent with decisions of this Court and decisions in other circuits.

---

*As noted *infra* in Section 2A, Hearst's argument below that the Guild waived any arguments by failing to object in writing is without merit since the arbitrator himself expressly reserved such arguments to both parties and since any award which would not have been binding on Hearst would be lacking in mutuality and accordingly could not have been binding on the Guild.

This Court has made it clear that:

> "An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960).

And, as the Court of Appeals for the Eighth Circuit held in *Truck Drivers & Helpers Union Local 784 v. Ulry-Talbert Co.*, 330 F.2d 562, 563 (8th Cir., 1964):

> "As arbitration is a matter of contract, the answer to the question [whether the arbitrator exceeded his jurisdiction] must lie within the four corners of the agreement between the parties. *John Wiley & Sons, Inc. v. Livingston*, 84 S.Ct. 909. If the authority to make the . . . award cannot be found or legitimately assumed from the terms of the arbitration agreement, then the arbitrator did exceed his authority. . . ."

It is, of course, well settled that an arbitrator's award will be set aside where he adds terms to an agreement which were not negotiated by the parties or modifies or changes the terms of an agreement, or where his decision is contrary to the language of the agreement or is not based on the essence of the agreement. *Truck Drivers & Helpers Union Local 784 v. Ulry-Talbert Co., supra; Local 342, UAW v. T.R.W.,*

Inc., 402 F.2d 727 (6th Cir., 1968); *Textile Workers v. American Thread Co.*, 291 F.2d 894 (4th Cir., 1961); *H.K. Porter Co. v. United Saw, File & Steel Products Workers*, 333 F.2d 596 (3d Cir., 1964); *c.f. Bhd. of Railway Trainmen v. Central of Ga. Ry. Co.*, 415 F.2d 403 (5th Cir., 1969); *Intl. Assn. of Machinists v. Hayes Corp.*, 296 F.2d 238 (5th Cir., 1961).

This rule is no less applicable to an arbitrator's award on procedural arbitrability than to an award on the merits.

In the instant case, the court of appeals concluded that there was no rational or reasonable basis in fact or in law under the peculiar circumstances of this case to sustain a claim of lack of timeliness. The court of appeals created no new rule with respect to the scope of review of procedural arbitrability awards. Rather, under the well-established test for review of arbitration awards, the court's conclusion that the record provided no basis for enforcing the award herein was correct.

Moreover, the arbitrator exceeded his jurisdiction by adding to the grievance-arbitration provisions of the agreement a new time limit, a "statute of limitations," which was not a part of the agreement. The arbitrator's award, which purports to add this so-called "statute of limitations" to the agreement is contrary to the essence of the agreement.

Article VII of the collective bargaining agreement carefully specifies the procedure to be followed by the parties in adjusting disputes. Each of the provisions of that Article sets forth a specific time limit within which each step of the grievance-arbitration process must occur, with the sole exception that no time limit is set forth for requesting the AAA to appoint an arbitrator.

By carefully detailing time limits for each of the other steps of the grievance-arbitration process, the parties clearly indicated that they intended to place no specific time limit or statute of limitations on the request for AAA appointment of an arbitrator.

In cases analogous to the instant case, where express time limits were not set forth, the courts and arbitrators, rather than applying a rigid "statute of limitations", have uniformly applied the doctrine of laches and have considered all of the equitable factors, including the requisite element of prejudice. *Boston Mutual Life Ins. Co. v. Insurance Agents' Int'l Union,* 171 F. Supp. 125 (D. Mass., 1959), aff'd 268 F.2d 556 (1st Cir., 1959); see also *Intl. Assn. of Machinists v. Hayes Corp.,* 296 F.2d 238, 244 (5th Cir., 1961); *Hydraulic Press Mfg. Co.,* 39 LA 1135, 1139 (Arb. Dworkin, 1962); *Magma Copper Co.,* 40 LA 45 (Arb. Gorsuch, 1962); *Labor Standards Assn.,* 48 LA 425, 427 (Arb. Joseph, 1967).

In the instant case, however, the arbitrator did not apply the doctrine of laches. On the contrary, he expressly rejected that doctrine, refused to consider the element of prejudice and concluded that the Guild had to show compliance with the "statute of limitations" which he added to Article VII of the agreement. In failing to apply the doctrine of laches, the arbitrator clearly failed to draw his award from the essence of the agreement. In addition, by adding a "statute of limitations" where the agreement was silent, he added to, changed, amended, and rewrote the provisions of the agreement, all in violation of Article VII, Section 3F, of the agreement, and clearly exceeded his jurisdiction.

It is clear that had the arbitrator applied the doctrine of laches, as he was required to do, he could not pos-

sibly have sustained the company's position. Had equity played any part in the arbitrator's decision, as it should have, none of the claims involved herein could have been barred, since Hearst was not prejudiced by the delay or in any way misled with respect to the Guild's intent to pursue the matter. In addition, if all of the factors of this case had been equitably considered, the delay could not have been deemed unreasonable since the parties were engaged in a labor dispute and this was hardly a "normal" time, most of the delay resulted from the lengthy proceedings before the Labor Commissioner, and the claims were continuously pursued in negotiations during the period in question.

Moreover, as the court of appeals concluded, the claim of lack of timeliness cannot be sustained since it was Hearst and not the Guild which continuously refused to recognize any duty to arbitrate. Under these circumstances, it is clear that Hearst was estopped to claim any lack of timeliness on the part of the Guild.*

The court of appeals herein thus correctly concluded that there was no rational or reasonable basis in the

---

*There can be little doubt that Hearst's continuous conduct in this matter as set forth in detail *supra* in the Statement of the Case and in the opinion of the court below, constituted a clear repudiation of the agreement and the arbitration provisions thereof. *Southwestern Electric Power Co. v. Local Union 738, IBEW*, 293 F.2d 929, 932 (5th Cir., 1961); *Lane, Ltd. v. Larus & Bros. Co.*, 243 F.2d 364 (2d Cir., 1957); *Bertero v. Superior Court*, 216 Cal.App.2d 213, 218-220 (2d Dist., 1963); *cf. Riess v. Murchison*, 384 F.2d 727, 732-733 (9th Cir., 1967). It is equally clear that once a party has repudiated arbitration, it cannot insist that the other party comply with the procedural prerequisites to arbitration contained in the agreement. *Southwestern Electric Co. v. Local Union 738, IBEW*, 293 F.2d 929, 932 (5th Cir., 1961); *United Steelworkers of America v. American Intl. Aluminum Corp.*, 334 F.2d 147, 150 (5th Cir., 1964); *Intl. Assn. of Machinists v. Hayes Corp.*, 296 F.2d 238, 243-245 (5th Cir., 1961); *Glass Bottle Blowers Assn. v. Arkansas Glass Container Corp.*, 183 F.Supp. 829 (E.D. Ark., 1960).

agreement, for adding a "statute of limitations" nor any basis upon which to sustain a claim of lack of timeliness. Such a conclusion justifies the vacating of an arbitration award for failure to draw its essence from the agreement.

In vacating the award on this basis, the court of appeals simply applied to the unique facts of this case a well established standard of this Court frequently applied by the circuit courts. The court of appeals in no way established any new standards of review of arbitrator's awards and the decision below does not raise any issue which warrants review by this Court.

3. The Decision Below Does Not Conflict With John Wiley & Sons v. Livingston, 376 U.S. 543.

In its Petition for Writ of Certiorari, Hearst argues that the court of appeals concluded that procedural defenses were not "grievances" under the agreements and therefore were not to be submitted to the arbitrator. Hearst further argues that this conclusion of the court is in conflict with *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964) which holds that procedural defenses are for the arbitrator to decide and raises a question left unanswered by this Court in *IUOE Local 150 v. Flair Builders, Inc.*, 406 U.S. 487 (1972).

Hearst's argument, however, misconstrues the decision of the court below. The issue left unanswered by this Court in *Flair, i.e.*, whether an affirmative procedural defense is a "grievance" which is to be submitted to an arbitrator under an arbitration clause covering "grievances" between the parties, was not raised or argued as an issue below and was not ruled upon by

the court below. The instant case, unlike *Wiley* and *Flair,* involves a petition to vacate an existing award rather than a petition to compel arbitration, and the issue of whether an affirmative procedural defense should be submitted to the arbitrator simply was not before the court. Although Hearst attempts to read into the court's opinion some kind of conclusion regarding this issue, the decision sets forth no holding regarding it.

The court of appeals' opinion does contain certain statements by way of dicta with respect to the narrow question whether the timeliness of the arbitrator's own appointment is a matter which should have been submitted to the arbitrator under the peculiar circumstances of this case. Even this narrow question, however, was not raised or argued before the court below and the court rendered no holding thereon.

In the portion of the court's opinion dealing with the instant petition to vacate the award, the court concluded:

> "The record discloses no facts upon which a claim of lack of timeliness can be sustained even if this had been the grievance contemplated by the agreement." (Appendix "A" to Petition, p. A-12.)

This is the only reference to the question of the arbitrator's jurisdiction to consider the timeliness of his own appointment contained in the portion of the court's opinion dealing with the petition to vacate. The Court's holding was that, whether or not the arbitrator had such jurisdiction, the award must be vacated.

It is thus clear that in reaching its decision to vacate the award, the court did not purport to resolve the question of an arbitrator's jurisdiction to decide

an issue of the timeliness of his own appointment—an issue which was neither raised nor argued below.

The only other reference in the court's opinion to the question of whether an issue as to the timeliness of an arbitrator's own appointment may be ruled upon by an arbitrator is in a brief dictum in the portion of the court's opinion (at p. A-14, Appendix "A" to Petition) dealing with the companion lawsuit for damages and other judicial relief. That dictum does not properly raise any issue for consideration in the instant case.

In the companion case, as in the instant case, the court makes no holding with respect to the question of an arbitrator's authority to resolve a question of the timeliness of his own appointment. Rather, the court, in considering its own power to dismiss plaintiff's judicial action and instead order arbitration, cites *Flair* for the proposition that the courts have jurisdiction to determine arbitrability and then to compel arbitration; the court then makes a passing comment, by way of dictum, regarding the propriety of an arbitrator deciding the timeliness of his own appointment. However, the court's holding that, even if Hearst's repudiation gave the Guild the right to obtain a judicial determination of its rights, arbitration was the proper road to follow, is in no way dependent on or indeed even related to its comment regarding an arbitrator's ruling on the timeliness of his own appointment.

It is thus apparent that even in the companion case involving the complaint for damages and other judicial relief, the court did not render any holding with respect to the issue left unanswered by this court in *Flair*. In any event, it is clear that in the instant case,

involving the petition to vacate the award, the issue left unanswered in *Flair* was not before the court, was not ruled upon, and was not the subject of any holding of the court.

The decision of the court of appeals thus does not conflict with *Wiley*, does not purport to determine any issue left undecided by this Court in *Flair* and does not present any substantial question warranting review by this Court.

4. The Decision Below Does Not Conflict With United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, or With the Decisions of Other Circuits Holding That an Arbitration Award Is to Be Vacated When It Fails to Draw Its Essence From the Agreement and Does Not Raise Any Substantial Issue Warranting Review by This Court.

In its Petition for Writ of Certiorari, Hearst argues that the decision below conflicts with the principle set forth in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) and cited and relied upon by the circuit courts in a number of decisions that the role of the courts in reviewing arbitrators' awards is limited, but that awards are to be vacated when they fail to draw their essence from the agreements. In particular, Hearst argues that (1) the court below failed to apply the proper standard of review and engaged in plenary judicial review of the award; (2) the decision must be read as holding that the *Enterprise* standard does not apply to procedural awards; and (3) that the decision amounts to a ruling that an award cannot draw its essence from the agreement where the arbitrator implies a term into the agreement.

Hearst's arguments attempt to read into the decision of the court of appeals holdings neither made nor suggested by the court itself nor, indeed, even argued for by the Guild.

In Section 2C *supra,* we have discussed at length the basis of the court's conclusion that there were no facts upon which a claim of lack of timeliness could be sustained. Although the court did not specifically state that the award failed to draw its essence from the agreement, there can be no doubt that the court so concluded. The court was obviously of the opinion, and correctly so, that there was no reasonable or rational basis for the award and therefore that the arbitrator had failed to draw his award from the essence of the agreement.

Hearst argues that the court engaged in a plenary review of the award and failed to apply the *Enterprise* standard of review to the procedural award herein. Nowhere in its opinion does the court hold or even suggest, however, that the *Enterprise* standard of review is inapplicable to a procedural award or that the courts are to engage in *de novo* review of the merits. Nor did the Guild so contend in briefs or argument to the court below.

Finally, Hearst argues that the decision below amounts to a ruling that an award cannot draw its essence from the collective bargaining agreement where the arbitrator implies a term into the agreement. Again, Hearst reads into the decision a holding not made by the court itself. The court in no way holds or suggests that an arbitrator is powerless to supply missing terms which give effect to the intent of the parties, and the court's decision in no way conflicts with the decisions of other circuits enforcing awards which have done so.

The court, in the instant case, has set down no rule that an arbitrator cannot imply a term into the agreement. Rather, the court has held that under the particular circumstances herein, the so-called "statute of limitations" added to the agreement by the arbitrator was unsupportable as a matter of fact and law. Accordingly, the award did not draw its essence from the agreement.

In arguing that the court herein has adopted a rule that an arbitrator cannot imply a term into the agreement, Hearst suggests that the court below may have followed or been influenced by the decision of the Court of Appeals for the Second Circuit in *Torrington Co. v. Metal Products Workers Local 1645*, 362 F.2d 677 (2nd Cir., 1966). Once again, in an attempt to raise an issue in this Court, Hearst attempts to read into the opinion something which simply is not there. The court of appeals does not even cite *Torrington* in the decision herein. Moreover, the Second Circuit's view in *Torrington* has previously been expressly rejected by the Ninth Circuit. *Holly Sugar Corp. v. Distillery Rectifying Union*, 412 F.2d 899, 905 (9th Cir., 1969).

Although Hearst has attempted in its petition herein to create the appearance of a conflict between the Ninth Circuit and other circuits with respect to the scope of review of arbitrator's awards, it is clear that no such conflict exists. The Ninth Circuit, like the other circuits, has consistently applied a narrow, limited scope of review in arbitration cases.*

**United Steelworkers of America v. Amax Aluminum Mill Products, Inc.*, 451 F.2d 740 (9th Cir., 1971); *Holly Sugar Corp. v. Distillery Rectifying Union*, 412 F.2d 899 (9th Cir., 1969); *San Francisco-Oakland Newspaper Guild v. Tribune Publishing Co.*, 407 F.2d 1327 (9th Cir., 1969); *Anaconda Co. v. Smeltermen's Union No. 16*, 402 F.2d 749 (9th Cir., 1968).

Nothing contained in the decision in the instant case evidences a departure by the Ninth Circuit from its well-established policy of affording limited review of arbitrator's awards. In the instant case, the Ninth Circuit set down no new rules broadening the scope of review of arbitration awards; it simply concluded that under the peculiar, unique facts of this case, and for a number of separate and independent reasons, the award should be vacated.

5. The Decision Below Does Not Nullify Ex Parte Arbitration and Does Not Frustrate the National Labor Policy of Favoring Arbitration as the Method for Settling Disputes.

Hearst argues in its Petition for Writ of Certiorari that the court of appeals expressly affirmed the holding of the district court that substantive arbitrability must be decided by a court before an *ex parte* arbitration may be held whenever one of the parties raises the issue of substantive arbitrability.

It is clear, however, that the court of appeals did not affirm or adopt such a holding; although the court of appeals recited the district court's conclusion of law on this issue along with the other conclusions of law of the district court, the court of appeals neither relied upon nor adopted nor even discussed this conclusion of law and certainly made no holding to the effect suggested by Hearst.

Thus, the court of appeals, immediately after reciting the district court's conclusions of law, goes on to say:

> "Of particular importance are the conclusions that the agreements are in full force and effect; that the grievance and arbitration provisions cover

> the alternate benefits and dismissal pay disputes and that Hearst is bound to resolve the grievances in the manner provided by the agreements; and that the parties must proceed to adjust their dispute as provided in Article VII." (Appendix "A" to Petition, p. A-11.)

The court of appeals in its discussion following its recital of the findings and conclusions below did not refer to the district court's conclusion regarding the necessity of a prior determination of substantive arbitrability. In its opinion, following the above quoted remarks, the court of appeals sets forth its own holdings. These holdings were based upon the appointment of the arbitrator in non-compliance with the AAA rules, the arbitrator's failure to assert jurisdiction over the subject matter and acquiescence in Hearst's non-appearance, and the absence of any facts to support the claim of lack of timeliness.

Clearly, the court of appeals in no way relied upon or adopted the district court's conclusion that a prior determination of substantive arbitrability was a prerequisite to proceeding to arbitration. The decision of the court of appeals thus does not in any way nullify or even affect *ex parte* arbitration, since it in no way holds that substantive arbitrability must be decided prior to proceeding to *ex parte* arbitration.* The deci-

---

*Although we believe it clear that the court did not hold that a prior determination of substantive arbitrability is a prerequisite to *ex parte* arbitration and that we therefore need not consider the effect such a holding might have, we also believe that Hearst grossly overstates the likely result of any such holding. First, al-

sion simply holds that under the particular circumstances of this case, and for a number of independent reasons, as discussed above, the award should be vacated.

CONCLUSION.

The decision of the court of appeals herein is based upon the peculiar, unique circumstances of the instant case. The court recognized that arbitration is the preferred remedy in labor relations. It set forth no new principles of law and the decision herein contains no broad holdings or legal conclusions which will be generally applicable to other cases. The court did not in any way undermine the arbitral process or arbitration; indeed it ordered the dispute arbitrated. It is highly unlikely that the particular facts in the instant case will ever reoccur, and the court of appeals' decision is carefully limited to those particular facts and raises no issues of any general significance in the administration of the federal labor laws. Because of the uniqueness

---

though many collective bargaining agreements incorporate AAA or Federal Mediation and Conciliation Service rules with respect to the conduct of the hearing, very few provide for *ex parte* appointment of an arbitrator. Thus, in most cases where one party denies arbitrability, the other party is required to go to court first to obtain an arbitral hearing. Second, if the parties choose to submit substantive arbitrability to the arbitrator, nothing prevents them from doing so. Finally, if substantive arbitrability is an issue, it may well have to be decided by the court, and it may therefore serve the interests of both parties and facilitate amicable settlements if the substantive arbitrability issue is decided in that forum at the outset. In any event, we believe it clear that the court of appeals in no way adopted the view that a decision as to substantive arbitrability is a prerequisite to a hearing or in any way based its decision herein on such a conclusion. Under these circumstances, of course, this issue is simply not raised by the decision below.

of the instant case and the court's express recognition of that uniqueness, the decision herein will have no impact on existing, established principles.

For all of these reasons, as well as the reasons set forth above, we respectfully submit that the instant case raises no issues warranting the granting of certiorari and urge that the Petition for Writ of Certiorari be denied.

DANIEL FOGEL,
Attorney for Respondent.

Of Counsel:
BODLE, FOGEL, JULBER, REINHARDT,
and ROTHSCHILD,
STEPHEN REINHARDT,
LESTER G. OSTROV.

March 7, 1975.

LIBRARY
SUPREME COURT, U. S.

No. 74-982

FILED
MAR 28 1975

IN THE

Supreme Court of the United States

October Term, 1974

THE HEARST CORPORATION and its Divisions, LOS ANGELES HERALD-EXAMINER and HILLBRO NEWSPAPER PRINTING COMPANY,

Petitioners,

vs.

LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES G. BAKALY, JR.,
611 West Sixth Street,
Los Angeles, Calif. 90017
Attorney for Petitioners:
The Hearst Corporation and Its Divisions, Los Angeles Herald-Examiner and Hillbro Newspaper Printing Company.

Of Counsel:
O'MELVENY & MYERS
STEPHEN P. PEPE
GORDON E. KRISCHER

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Supplemental Brief in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit 1

The Decision Below Is in Direct Conflict With a Recent Decision of the Eighth Circuit Which Holds an Award Draws Its Essence From the Collective Bargaining Agreement Even Though the Arbitrator Implies a Term Into the Agreement When Interpreting It 2

Conclusion 4

Appendix Supp. A. Opinion of the United States Court of Appeals, Eighth Circuit .....App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
I.U.E. v. Peerless Pressed Metals Corp., 489 F.2d 768 (1st Cir.), cert. den., 414 U.S. 1022 (1973)	4
United Automobile Workers v. White Motor Corp., 505 F.2d 1193 (8th Cir. 1974), pet. for cert. filed, Sup. Ct. No. 74-1040, 43 U.S.L.W. 3505 (Feb. 20, 1975)	2, 3, 4
United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960)	3

Rule	
United States Supreme Court Rules, Rule 24	1

No. 74-982

IN THE

Supreme Court of the United States

October Term, 1974

THE HEARST CORPORATION and its Divisions, LOS ANGELES HERALD-EXAMINER and HILLBRO NEWSPAPER PRINTING COMPANY,

Petitioners,

vs.

LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Pursuant to Supreme Court Rule 24, Petitioners file this Supplemental Brief in support of their Petition to call attention to a recent decision of the United States Court of Appeals for the Eighth Circuit and to other intervening matter not available to Petitioners at February 7, 1975, the date of their last filing.

The Decision Below Is in Direct Conflict With a Recent Decision of the Eighth Circuit Which Holds an Award Draws Its Essence From the Collective Bargaining Agreement Even Though the Arbitrator Implies a Term Into the Agreement When Interpreting It.

Petitioners have argued that the Ninth Circuit's decision below herein (reported at 504 F.2d 636 and set forth in Appendix A to the Petition) is in direct conflict with decisions of the First, Third, Seventh and Tenth Circuits which hold that a labor arbitration award draws its essence from the collective bargaining agreement even though the arbitrator implies a term into the agreement when interpreting it. (See Petition pp. 18-22.) The decision below also directly conflicts with the recent decision of the Eighth Circuit in *United Automobile Workers v. White Motor Corp.*, 505 F.2d 1193 (8th Cir. 1974), *petition for cert. filed*, Sup. Ct. No. 74-1040, 43 U.S.L.W. 3505 (filed Feb. 20, 1975). A copy of the Eighth Circuit's opinion is set forth in "Appendix Supp. A" hereto.

In *White Motor Corp., supra*, the parties collective bargaining agreement adopted and incorporated by reference a "Pension Agreement and Plan" which contained clear and unambiguous language giving the employer the sole right to terminate the plan "at any time." (App. Supp. A at 2.) The employer selected a date to terminate the plan which resulted in an arbitration over the employer's right to do so. The arbitrator ruled that, despite the clear language of the plan and despite the fact that no termination date was provided in the plan, the pension plan could not be terminated by the employer until the expiration date of the collective

bargaining agreement incorporating the plan. Thus, the arbitrator implied a termination date for the plan where none was expressly provided, and the termination date implied was clearly contrary to the employer's express right to terminate the plan at any time. In arriving at his award, the arbitrator looked to the history of collective bargaining between the parties and resorted to the arbitrator's own experience outside of the agreement he was then interpreting in order to ascertain the parties' intent.

Upon the union's petition for enforcement, the district court enforced the award and on appeal the Eighth Circuit affirmed, holding, consistent with *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960), that the arbitrator's award did draw its essence from the collective bargaining agreement even though the arbitrator implied a term. The court of appeals recognized that "[i]n interpreting a collective bargaining agreement it is often necessary to go outside the four corners of the contract itself and examine the agreement history to ascertain the intent of the agreement and determine the rights and duties of the parties." (App. Supp. A at 8-9.) This is what both arbitrators did in the instant case and in *White Motor Corp.*: however, in the instant case the award was vacated on this ground and on other grounds; in *White Motor Corp.* the award was enforced.

The considerable confusion among the circuits in interpreting and applying the *Enterprise* standard of judicial review of arbitration awards, and more particularly, whether an arbitration award which implies a term into a collective bargaining agreement can nevertheless draw its essence from the collective bargaining

agreement, is an important and recurring question* which warrants review by this Court. Presently the Court has before it petitions for certiorari in two cases, the instant case and No. 74-1040, raising the same issue after the Eighth and Ninth Circuits decided the issue differently.

CONCLUSION.

For the foregoing reasons and for the reasons set forth in the Petition, certiorari should be granted.

Respectfully submitted,

CHARLES G. BAKALY, JR.,

Attorney for Petitioners:

The Hearst Corporation and Its Divisions, Los Angeles Herald-Examiner and Hillbro Newspaper Printing Company.

Of Counsel:

O'MELVENY & MYERS

STEPHEN P. PEPE

GORDON E. KRISCHER

March 21, 1975

*The question has been presented to the Court at least three times in the last two terms, including the instant case, No. 74-1040, and in I.U.E. v. Peerless Pressed Metals Corp., 489 F.2d 768 (1st Cir.) *cert. denied*, 414 U.S. 1022 (1973) (cited in the Petition herein at pp. 20, 23-24).

APPENDIX SUPP. A.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), et al., Plaintiffs-Appellees,

v.

WHITE MOTOR CORPORATION, et al.,

Defendants-Appellants.

No. 74-1379.

United States Court of Appeals,
Eighth Circuit.

Submitted Sept. 11, 1974.

Decided Nov. 11, 1974.

Before GIBSON, Chief Judge; BRIGHT and STEPHENSON, Circuit Judges.

BRIGHT, Circuit Judge.

White Motor Corporation (Company) appeals from the judgment of the district court enforcing an arbitration award in favor of appellee-United Auto Workers Union (Union). We affirm.

In January 1972, the Company notified the Union that it planned to close two factories manufacturing farm machinery located at Hopkins and Minneapolis, Minnesota. The Company also informed the Union that the Pension Plan for the employees at these two plants would be terminated as of June 30, 1972. The Union, claiming that the Pension Plan could not be terminated until May 1, 1974, the expiration date of the Collective Bargaining Agreement, sought arbitration of the dispute. The Company refused, and on motion of the Union, the federal district court issued an order compelling arbitration. The arbitration sustained the

Union's position and his award prohibited the Company from terminating the Pension Plan for Union-represented employees before the expiration date of the Collective Bargaining Agreement. White Motor Corp. & UAW, 61 Lab.Arb. 320 (1973) (Seitz, Arbitrator). After the Company announced that it would not comply with the arbitration award, the Union sought enforcement of the award in a suit filed in federal district court pursuant to Section 301 of the Labor-Management Relations Act, as amended, 29 U.S.C. § 185. On cross motions for summary judgment, the district court (Judge Larson) ruled in favor of the Union and ordered enforcement of the award. The Company appeals from that decision.

The Company contends that specific and unequivocal language in an agreement between the parties authorized it to terminate the then existing Pension Plan at any time. The phrase relied on by the Company, as found in the Pension Plan, reads: "The Company shall have the sole right at any time to terminate the entire Plan." The Company maintains that since the foregoing provision is "clear and unambiguous," the arbitrator exceeded his authority in extending the Pension Plan beyond June 30, 1972, the termination date selected by the Company.

In ruling for the Union, the arbitrator did not limit his analysis to the explicit terms of the Collective Bargaining Agreement and the Pension Plan but also examined the history of the pension arrangements commencing with the agreements executed in 1950 between the Company and the Union[1] consisting of three

[1]The United Auto Workers became the bargaining representative for the employees on July 6, 1955. Prior to that date, the employees were represented by Local 1146 of the United Electrical, Radio and Machine Workers of America.

separate documents—a Collective Bargaining Agreement, a Pension Agreement, and a Pension Plan. The Pension Agreement recited that the Company would adopt and establish a Pension Plan in the form attached for the benefit of all employees, including both union and nonunion workers. Section 10.02 of that attached Pension Plan recited the crucial language, to which we have referred, ostensibly granting the Company the right to terminate the Pension Plan at will. This right of termination, however, did not become binding on Union employees since the Pension Agreement embodied this stipulation:

> The Company waives its right to amend the [Pension] Plan or terminate it as to employees represented by the Union while this [Pension] Agreement is in full force and effect.

The 1950 Collective Bargaining Agreement listed a termination date of September 1, 1952,[2] while the Pension Agreement recited a later expiration date of January 1, 1956.[3] Prior to 1968, the Union and the Company made periodic changes in the pension arrangements by formally amending the Pension Agreements through written documents, each entitled "Amendment of Pension Agreement." These amendments were dated respectively November 16, 1954, February 8, 1957, October 22, 1959, October 1, 1962, and May 10, 1965. Except for the May 10, 1965, amendment, each amendment provided a termination date for the Pension Agreement extending beyond the expiration date of the

---

[2]The Collective Bargaining Agreement was to continue thereafter for yearly periods unless the parties gave a notice of termination at least 60 days prior to the end of the contract period.

[3]The Pension Agreement was to continue on a yearly basis thereafter unless terminated by one of the parties on six months notice.

then existing Collective Bargaining Agreement. For example, the Amendment of Pension Agreement dated October 1, 1962, extended the 1950 Pension Agreement to January 1, 1966, although the terms of the then existing Collective Bargaining Agreement contained a termination date of May 1, 1965. In 1965, however, the Amendment of Pension Agreement and the Collective Bargaining Agreement provided for essentially the same termination date.[4] Each Amendment of the Pension Agreement included a separate paragraph with essentially the following language:[5]

> In all other respects [except as amended] the Pension Agreement entered into between the parties hereto under date of September 7, 1950, and the Pension Plan therein referred to are hereby ratified and confirmed. [Amendment of Pension Agreement dated November 16, 1954.]

Thus, until 1968, the respective rights of the parties regarding termination of the Pension Plan were clear. The Company reserved the right to unilaterally terminate the Pension Plan for nonunion employees at any time. As to Union employees, however, the Company's right to terminate the Pension Plan was limited to the expiration date specified in the Pension Agreements and its subsequent amendments.

---

[4]The Collective Bargaining Agreement terminated at 12:01 A.M. May 1, 1968, while the Amendment of Pension Agreement terminated April 30, 1968.

[5]This paragraph was slightly altered in the 1965 Amendment of Pension Agreement:

> In all other respects said Pension Agreement, as amended, and the Pension Plan referred to therein, as amended, are hereby ratified and confirmed.

Additionally, the 1962-1965 and the 1965-1968 Collective Bargaining Agreements contained general information concerning benefits available under the Pension Plan.

In the Collective Bargaining Agreements for 1968-1971 and 1971-1974, the format for the pension arrangements was altered. These bargaining agreements each contained this paragraph:

> The parties hereto have agreed to a *Pension Agreement and Plan,* printed under separate cover, which is made a part of this Agreement the same as if set forth at length herein. (Emphasis added).

A signed document entitled "Minneapolis-Moline Pension Plan" was attached to these Bargaining Agreements. This attachment included similar terms and was essentially the same in format as the original 1950 Pension Plan, with, of course, changes in benefits derived from the various amendments made over the intervening years.

The parties in 1968 and 1971, however, did not execute any document similar to the Pension Agreement of 1950, nor any agreement similar to the later documents entitled Amendment to Pension Agreement, in which the Company had expressly agreed to waive its right to unilaterally terminate the Pension Plan at any time as to Union employees. Because of the absence of a waiver provision in the 1968 and 1971 documents, the Company argues that the clause in the Pension Plan providing for termination "at any time" becomes the controlling provision of the agreement regulating termination of the Pension Plan as to all employees. In rejecting this argument, the arbitrator stated:

> The record made satisfies me that in the negotiations leading to the 1968 collective agreement and the 1968 Pension Agreement and Plan, nei-

ther side made a demand or proposal related to the abandonment of the waiver provisions; and, apparently, it had not been the subject of bargaining or even discussion. The Union brief argues that the absence of the waiver provision was not even noticed.

* * *

A long-standing and repeatedly expressed waiver of a right to terminate a Pension Plan as to union-represented employees disappeared from the 1968 and 1971 Pension Agreements under circumstances that nobody can account for or explain. The absence of the provision affects very substantial rights under the Plan.

The arbitrator concluded:

Thus, the 1971 Pension Agreement and Plan which was merged into and absorbed by and is a component of the collective bargaining agreement lives to the end of the term of the collective bargaining agreement. The Plan has no independent termination date nor is there a Pension Agreement with a different termination date. The Pension Agreement and Plan of 1971 draw their termination date from the collective bargaining agreement of which they are parts.

These circumstances leave the Company free to invoke Section 10.02 of the Plan to terminate the Plan at will insofar as members of non-bargaining unions are concerned. The fact that the Plan has been absorbed into the collective bargaining agreement, however, reinforces the point that, insofar as union-represented employees are concerned, the Company's right to terminate, ex-

> pressed in Section 10.02 of the Plan, is affected by and is subordinated to the provisions of the collective agreement.
>
> Accordingly, on this question, I conclude that the Company had no power or right unilaterally to terminate the Plan as to union-represented employees on June 30, 1972. (Footnote omitted).

The district court ruled that the arbitrator had not exceeded his authority and ordered the arbitrator's award enforced. The Company asserts that the arbitrator exceeded his authority in not enforcing the clear terms of a written agreement binding the parties on the issue presented to the arbitrator and that, therefore, the district court committed error in not setting the arbitrator's award aside.

In resolving this case, we note initially that judicial review of an arbitrator's decision is limited. The scope of that review is discussed by the Supreme Court in United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960):

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. * * *
>
> [T]he arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. * * * He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. [*Id.* at 596-597, 80 S.Ct. at 1360-1361 (footnote omitted).][6]

Thus, our function is limited solely to determining whether the arbitration decision, in the language of the Supreme Court, "draws its essence from the collective bargaining agreement." 363 U.S. at 597, 80 S.Ct. at 1361.

In interpreting a collective bargaining agreement it is often necessary to go outside the four corners of the contract itself and examine the agreement history to ascertain the intent of the agreement and determine the rights and duties of the parties. The touchstone for the construction and interpretation of labor agreements subject to arbitration is found in the *Steelworkers*

---

[6]*See* United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 567-569, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582-583, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960) (these two cases and United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 563, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960) comprise the *Steelworkers Trilogy*); Western Iowa Pork Co. v. National Bro. Pack & Dairy Wkrs, 366 F.2d 275 (8th Cir. 1966). In *Western Iowa Pork*, this court stated that "* * * in making the determination of whether an arbitrator has exceeded his authority the agreement must be broadly construed with all doubts being resolved in favor of his authority." 366 F.2d at 277.

Trilogy, supra. In the second case of the *Trilogy,* United Steelworkers of America v. Warrior & Gulf Nav. Co., *supra,* the Supreme Court specifically examined the unique characteristics of the labor contract with which the arbitrator deals:

> The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. * * * The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.
>
> "* * * There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties.
>
> One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages * * *."
>
> Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. [363 U.S. at 578-580, 80 S.Ct. at 1351-1352.]

In discussing the labor arbitrator's source of law, the Court added that he

> is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. [363 U.S. at 581-582. 80 S.Ct. at 1352.]

In Humble Oil & Refining Co. v. Teamsters Local 866, 447 F.2d 229 (2d Cir. 1971), the Second Circuit, in discussing the authority of the arbitrator to resolve a labor-management issue by relying on agreement history, stated:

> To determine whether the Company had violated rights intended by the parties to be preserved by the language of that provision, the [arbitration] Board was required to discover the intent of the parties, and to do this it looked to evidence and not merely the cold and cryptic words on the face of the agreement which shed little light on the issue. We see nothing in the arbitration clause which forbids resort to such rudimentary tools of construction. If the Board were barred from resorting to bargaining history and rights established under similar language in past contracts, the parties to the contract would be remitted to securing arbitration only when there was a violation of a provision so plain and unambiguous as to require no collateral evidence of intent—and we might add hardly requiring arbitration itself. * * * The arbitrators here, * * * confronted with an opaque but "express provision" of the contract governing the rights at issue, sensibly sought clarification in totally relevant evidence beyond the language of the contract. [*Id.* at 232-233.]

Other cases support the view that an arbitrator may examine agreement history in order to resolve a question not expressly covered by a collective bargaining agreement. *See* Baldwin-Montrose Chem. Co. v. International Rubber & Plastic Wkrs. 383 F.2d 796 (6th Cir. 1967); H. K. Porter v. United Saw. File & Steel

Products Wkrs, 333 F.2d 596 (3d Cir. 1964); Independent Petroleum Wkrs. v. American Oil Co., 324 F.2d 903 (7th Cir. 1963), aff'd by an equally divided court, 379 U.S. 130, 85 S.Ct. 271, 13 L.Ed.2d 333 (1964); *cf.* Teamsters Local 688 v. Crown Cork & Seal Co., 488 F.2d 738 (8th Cir. 1973).

We believe the record demonstrates that the Collective Bargaining Agreement executed in 1971 (as well as 1968), discloses an ambiguity in two respects relating to the Company's right of termination. First, the Bargaining Agreement specifically refers to an attached "Pension Agreement and Plan." This phrase could refer to a single document consisting of both a Pension Agreement and a Pension Plan or, as had been the case in prior years, to two documents, a separate Pension Plan and a separate Pension Agreement. As we have already noted, the attached Pension Agreement and Plan was entitled "Minneapolis-Moline Pension Plan" and referred to a document essentially the same in form as the 1950 Pension Plan but with modifications wrought by amendments made over the past two decades. The phrase "Pension Agreement," as previously used by the parties, designated a document separate from the Pension Plan and contained a termination date and a specific waiver of the Company's right to terminate the Pension Plan at will as to Union employees. Since neither the contract documents nor contemporaneous history of the 1968 and 1971 Bargaining Agreements offers any explanation for the absence of an attachment to the Bargaining Agreement entitled "Pension Agreement," an arbitrator could conclude that his omission was inadvertent, permitting him to resort to evidence extrinsic to the written contract documents

to determine the full agreement intended by the parties. When an agreement may be expected to speak on a subject but does not, its silence imports ambiguity on that subject. *See* Humble Oil & Refining Co. v. Teamsters Local 866, 447 F.2d 229 (2d Cir. 1971); Baldwin-Montrose Chem. Co. v. International Rubber & Plastic Wkrs, 383 F.2d 796 (6th Cir. 1967); H. K. Porter v. United Saw, File & Steel Products Wkrs, 333 F.2d 596 (3d Cir. 1964).

In commenting on this omission, the arbitrator observed:

> [T]he writer's experience informs him that it is most difficult to conceive that a Union would knowingly, lightly, or casually acquiesce in the elimination of a Company waiver of a right to terminate a pension plan in which the employees it represents participate without a vigorous struggle or, at least, the attempt to obtain some satisfactory quid pro quo. To accept the Company's thesis would mean that one week after the signing of the 1971 (or 1968) pension agreement and plan, the Company, at will, could have terminated the Plan, despite the fact that it had agreed in writing to waive the exercise of that right for eighteen years in a series of five documents. The Company's thesis is incompatible with the institutional behavior of labor organizations in our society and does not take account of the reasonable expectations that the usages of the past have engendered.

The arbitrator properly noted a second aspect of the ambiguity relating to the termination date for the Pension Plan. The bargaining history disclosed that prior

to 1968 the parties had always specified a definite termination date of the Pension Plan extending to or beyond the date established for the expiration of the Collective Bargaining Agreement. But in 1968 and 1971, the "Minneapolis-Moline Pension Plan" did not contain any specific termination date. Given this omission, the arbitrator did not exceed his authority in concluding that the May 1, 1974, date for termination of the Collective Bargaining Agreement as the only relevant date specified in the documents executed by the parties served also as the termination date of the Pension Plan as to Union members.

Our review of the record satisfies us that the arbitrator arrived at a decision drawn from the contract documents and from the history of the agreements leading up to the 1971 Collective Bargaining Agreement. We conclude, contrary to the Company's contentions, that the arbitrator did not exceed his arbitral authority and that his award is valid since it "draws its essence from the collective bargaining agreement." United Steelworkers of America v. Enterprise Wheel & Car Corp., *supra*, 363 U.S. at 597, 80 S.Ct. at 1361.

Accordingly, the district court properly enforced the arbitrator's award.

Affirmed.